No. 77-1387

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

THE FEDERAL OPEN MARKET COMMITTEE
OF THE FEDERAL RESERVE SYSTEM,

Petitioner,

v.

DAVID R. MERRILL,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a federal agency may temporarily withhold from public disclosure final and effective statements

of policy required to be disclosed promptly by the Freedom of Information Act, where the justification for delay is that prompt disclosure may have an adverse effect on the implementation of the agency's policy.

ARGUMENT

The issue presented by this petition raises a question as to the applicability of the Freedom of Information Act to the monthly policy statements of the Federal Open Market Committee of the Federal Reserve System. The petition cites no conflict among the circuits nor, we respectfully submit, does it raise any broad issue of public policy. We believe that the judgment of the district court and the unanimous decision of the court of appeals affirming the district court are clearly correct. Even if the opinion and judgment below were erroneous, we submit that

the issue raised by the petition is not of sufficient importance to warrant review by this Court.

The policy statements at issue are subject to disclosure under § 552(a)(1)(D) and § 552(a)(2)(B) of the Freedom of Information Act (Pet. App. A, p. 6A; Pet. App. C, pp. 38A-40A). In NLRB v. Sears, Roebuck & Co., this Court noted its "reluctan[ce] . . . to construe Exemption 5 to apply to the documents described in 5 U.S.C. § 552(a)(2)." 421 U.S. 132, 153 (1975) (see Pet. App. A, p. 13A n. 17).[1/]

1/ Although § 552(a)(1)(D) and § 552(a)(2)(B) both require disclosure of statements of policy, § 552(a)(1)(D) requires the current publication of statements of general policy. Therefore, we assume that this Court's reluctance, as expressed in Sears, extends with even more force to § 552(a)(1)(D) statements of general policy.

Petitioner Federal Open Market Committee ("FOMC") makes three points in support of its petition. Each of them is unpersuasive.

1. First, petitioner asserts that the legislative history of the Freedom of Information Act, 5 U.S.C. § 552, though not the language of the Act, demonstrates that Exemption 5, 5 U.S.C. § 552(b)(5), was designed not only to protect the deliberative process of agencies, but also "to protect against the premature disclosure of agency plans" if such disclosure would impede agency performance or otherwise harm the public interest (Pet. 12) (emphasis in original).[2/] It is urged, therefore,

2/ Arguing that these two purposes are tied, counsel for petitioner suggests that, if the judgment below is allowed to stand, to combat the effects of prompt disclosure of its statements of policy the Federal Open Market Committee might adopt for public consumption written policy statements that do [footnote continued on following page]

that Exemption 5 allows the delayed disclosure of agency policy statements (Pet. 16-17).

In support of this point petitioner quotes language from the House Report on the Act, H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6, 10 (1966) and cites the Senate Report on the Act, S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (Pet. 13-14).[3/] The court of

[footnote continued from preceding page] not accurately reflect its actual policy decisions (Pet. 12 n. 8). By this suggestion counsel attributes to the FOMC a degree of underhandedness that is unworthy of the Committee.

3/ Petitioner implies that this language represents Congress' response to testimony by the Department of the Treasury concerning premature disclosure of information about Federal Reserve System purchases (Pet. 13). However, that testimony was given in support of a catch-all general interest exemption, and not an amendment to Exemption 5. Hearings on H.R. 5012 Before the House Committee on Government Operations, 89th Cong., 1st Sess. 49-51 (1965).

appeals examined this very language and concluded that it did not support petitioner's position (Pet. App. A, pp. 11A-14A). The quoted language refers to predecisional material and material that, although final, is not yet effective. Because the policy statements at issue are both final and effective, they do not fall within this language.[4/] The court of appeals correctly concluded that such "[a]mbiguous inferences from legislative history cannot supplant the clear mandate of the language of the statute" (Pet. App. A, pp. 14A-15A).

Furthermore, the delay of more than a month urged by petitioner would, in effect, allow disclosure of policy

4/ Requiring the prompt disclosure of these final and effective policy statements has no bearing on the disclosure of the predecisional and/or not yet effective decisions referred to in the legislative history (compare Pet. 11, 14 with Pet. App. A, p. 12A n. 16).

statements only at a time when such policies had been superseded at the following monthly FOMC meeting (see Pet. 7; Pet. App. C, p. 41A). Such delay would contravene the Act's requirements of current publication, § 552(a)(1)(D), and prompt availability, § 552(a)(2)(B) (Pet. App. C, pp. 40A-41A; see Pet. App. A, p. 8A n. 11).

2. In petitioner's second and third points it asserts that the record contains affidavits demonstrating that prompt disclosure of its statements of policy "is likely to impede seriously the Committee's performance of its monetary policy functions" (Pet. 14),[5/]

5/ The judgment in this case was entered on a motion for summary judgment (Pet. App. C, p. 21A). We submit that the judgment and affirmance are correct as a matter of law even if the petitioner's affidavits are true.

Moreover, the affidavits cited by petitioner contain expressions of opinion as to economic consequences, and in the portion relied on here by

[footnote continued on following page]

and that the court of appeals' failure to consider the impact of disclosure on petitioner's operations was erroneous (Pet. 16).

We had supposed it clear from this Court's opinions that it was the Congress

[footnote continued from preceding page] petitioner, no facts are quoted. Corresponding opinions reaching precisely opposite conclusions are now a matter of public record. In comments submitted to the House Subcommittee on Domestic Monetary Policy, Professor Milton Friedman urged the immediate release of FOMC policy actions. Hearings on H.R. 9465 and H.R. 9589 Before the Subcommittee on Domestic Monetary Policy of the House Committee on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. 201-02 (1977) ("Hearings"). Professor William Poole noted that the FOMC's "policy intentions for money growth can be released promptly . . . without generating market disturbances." Hearings at 239. See generally S. Maisel, Managing the Dollar, 174-76 (1973) ("Maisel") (Mr. Maisel was a governor of the Federal Reserve Board and an FOMC member from 1965 to 1972).

Furthermore, both Professor Poole and former Governor Maisel have noted that market insiders profit from the delay in releasing policy statements to the prejudice of non-specialist investors and the public generally. Hearings at 238; Maisel at 174-75.

that balanced the opposing interests in adopting the Freedom of Information Act, thereby removing from the agencies and the courts difficult questions including the economic impact of compliance with the Act's disclosure commands and the public's need for disclosure. See, e.g., Department of Air Force v. Rose, 425 U.S. 352, 360-62 (1976); EPA v. Mink, 410 U.S. 73, 79-80 (1973).[6/]

6/ Petitioner's conduct during this case confirms that which was already clearly demonstrated under the old public records act; an agency's self-assessment of the need for secrecy is bound to err on the side of non-disclosure, contrary to the mandate of the Freedom of Information Act. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 4-6 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 3-5 (1965). As petitioner concedes (Pet. 7 n. 5), prior to the initiation of this lawsuit, petitioner believed that it was necessary to defer release of the policy statements for 90 days. Yet, during this suit petitioner first conceded that a 45-day delay is acceptable and now believes that only a 30-day delay is required.

As the court of appeals pointed out, it is the function of Congress, not the courts, to consider whether to amend the Freedom of Information Act if the ruling in this case, or any other under the Freedom of Information Act, would "impede implementation of national monetary policy" (Pet. App. A, p. 18A). That is precisely what the Congress is now considering as a result of the judgment in this case. There is a bill currently pending before the Senate Committee on Banking, Housing, and Urban Affairs "to amend the Federal Reserve Act to provide for deferral of the disclosure to the public of the Federal Open Market Committee's domestic policy directive." S. 2427, 95th Cong., 2d Sess., 124 Cong. Rec. S438 (daily ed. Jan. 25, 1978).

"The wisdom of the balance struck by Congress is not open to judicial scrutiny." Administrator, FAA v.

Robertson, 422 U.S. 255, 267 (1975). We think appropriate Mr. Justice Stewart's observation that the Court's "role is to interpret statutory language, not to revise it." Id. at 269 (Stewart, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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